No. 11,144

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETER L. YOUNG,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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Subject Index

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FOREWORD.

At the oral argument, appellant was granted permission to file a supplemental brief discussing (1) the jurisdiction of this court to entertain the appeal, and (2) the decisions of this court respecting reasonable doubt in criminal cases.

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1. THE JURISDICTION OF THIS COURT TO REVIEW THE FINAL JUDGMENT OF THE SUPREME COURT OF THE TERRITORY OF HAWAII IS SUSTAINED BY SECTION 128 OF THE JUDICIAL CODE (28 U.S.C.A., SEC. 225).

The pertinent parts of the section provide:

> "(a) * * *. The circuit courts of appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions— * * *

> Fourth. In the Supreme Courts of the Territory of Hawaii * * *, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; * * *."

The constitutional guaranties of the Federal Bill of Rights are applicable to the Territory of Hawaii.

Duncan v. Kahanamoku, 66 S.Ct. 606, 613.

Waialua Agr. Co. v. Christian, 305 U.S. 91, 109, 59 S.Ct. 21, 30, 88 L. Ed. 60.

Farrington v. Tokushige, 273 U.S. 284, 298, 299, 47 S.Ct. 406, 409, 71 L.Ed. 646.

Lovato v. New Mexico, 242 U.S. 199, 37 S.Ct. 107, 108, 61 L.Ed. 244.

Rasmussen v. United States, 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862.

Hawaii v. Mankichi, 190 U.S. 197, 23 S.Ct. 787, 47 L.Ed. 1016.

Callan v. Wilson, 127 U.S. 556, 8 S.Ct. 1301, 32 L.Ed. 223.

Therefore, this court has jurisdiction to review the final decision of the Supreme Court of the Territory of Hawaii to determine if appellant was denied "due process of law" under the Federal Bill of Rights.

Farrington v. Tokushige, 273 U.S. 284, 298, 299, 47 S.Ct. 406, 409, 71 L.Ed. 646.

Lovato v. New Mexico, 242 U.S. 199, 37 S.Ct. 107, 108, 61 L.Ed. 244.

Questions of "due process of law" are not to be treated "narrowly or pedantically, in slavery to forms or phrases".

Pearson v. McGraw, 308 U.S. 313, 318, 60 S.Ct. 211, 213, 84 L.Ed. 293.

Burnett v. Wells, 289 U.S. 677, 678, 53 S.Ct. 761, 764, 77 L.Ed. 1439.

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166.

"'Due process of law' contemplates a trial in a criminal case by a fair jury with full evidence and correct instructions as to the law".

Henderson v. State, Fla., 20 So. 2d 659, 661.

In criminal cases, "due process of law" contemplates proper instructions on reasonable doubt.

Howard v. Fleming, 191 U.S. 176, 24 S.Ct. 49, 50, 51, 48 L.Ed. 121.

In criminal cases, "due process of law" is denied by instructions which set at naught the established principles of reasonable doubt.

Howard v. Fleming, 191 U.S. 176, 24 S.Ct. 49, 50, 51, 48 L.Ed. 121.

Chaffee v. United States, 85 U.S. 516, 545, 21 L.Ed. 909, 914.

Paddock v. United States, 9 Cir. 1935, 79 F. 2d 872, 877.

As the case was decided in a territorial court and appellant is maintaining that he was denied rights based upon the Federal Bill of Rights, the jurisdiction of this court to entertain the appeal is not open to doubt.

Turning to another aspect of section 128 of the Judicial Code, counsel for appellant have been unable to find any construction of the words "or any authority exercised thereunder" appearing in said section. Somewhat similar language was considered and construed by the Supreme Court in *Milligar v. Hartupee,* 73 U.S. 258, 261, 18 L.Ed. 829, 830, decided in 1868, but the case is of no practical help.

The Supreme Court of the Territory of Hawaii exercises its authority under section 81 of the Hawaiian Organic Act. (48 U.S.C.A., sec. 63.) In the exercise of that authority its decisions must be in conformity with the Constitution of the United States. (*Waialua Agr. Co. v. Christian,* 305 U.S. 91, 109, 59 S.Ct. 21, 30, 81 L.Ed. 60.) It cannot deprive an individual of his Constitutional protections by an application of territorial law. (*Duncan v. Kahanamoku,* 66 S.Ct. 606, 613.) In the present case, and in the exercise of its authority under the said Organic Act of Hawaii, the territorial Supreme Court applied the territorial law respecting instructions on reasonable doubt. (T. 41-42.) Appellant's position is that the territorial Supreme Court thereby denied him "due process of law". The present case therefore involves the exercise of authority by the Supreme Court of the Territory of Hawaii, under the Organic Act of

Hawaii, whereby it is claimed by appellant his rights under the Federal Bill of Rights were violated. On this aspect, the jurisdiction of this court to entertain the appeal would also seem clear.

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2. THE DECISIONS OF THIS COURT RESPECTING REASONABLE DOUBT IN CRIMINAL CASES.

The instruction challenged on this appeal reads in its entirety as follows (T. 8-9), the italics indicating the portion around which the controversy revolves on the appeal:

> "I further instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proved him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, *but a doubt that you could give a reason for.*
>
> A reasonable doubt is not a slight doubt, not a probable doubt, not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon mortal (moral) evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing

the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed, it is your duty to convict and if you have not such belief so formed it is your duty to acquit."

The subject of reasonable doubt has been considered by this court on many occasions. Without purporting to exhaust the list, the following may be cited:

Rose v. United States, 1945, 149 F. 2d 755, 759.

Henderson v. United States, 1944, 143 F. 2d 681, 682.

Pon Wing Quong v. United States, 1940, 111 F. 2d 751, 757.

Paddock v. United States, 1935, 79 F. 2d 872, 876, 877.

De Groot v. United States, 1935, 78 F. 2d 244, 251, 252.

Kearns v. United States, 1928, 27 F. 2d 854, 855.

Arine v. United States, 1926, 10 F. 2d 778, 780, 781.

Dell 'Aira v. United States, 1926, 10 F. 2d 102, 106.

Raffour v. United States, 1922, 284 F. 720, 721.

McCurry v. United States, 1922, 281 F. 532, 533.

Crane v. United States, 1919, 259 F. 480, 483, 484.

Louie Ding v. United States, 1917, 246 F. 80, 83.

Sheppard v. United States, 1916, 236 F. 73, 80.
Griggs v. United States, 1908, 158 F. 572, 577, 578.
Owens v. United States, 1904, 130 F. 279, 283.

In three of the cited cases the court considered instructions containing language similar to that italisized in the instruction prefacing this subdivision. The first case was *Owens v. United States,* 130 F. 279, where the instruction was as follows (p. 283): "A reasonable ground of doubt is one which is reasonable from the evidence or want of evidence. *It must be a ground of doubt for which a reason can be given, which reason must be based upon the evidence or want of evidence".* (Emphasis added.) In disapproving the language thus emphasized, the court said (p. 283):

> "A doubt arising out of evidence is a mental operation for which it may often be very difficult, and, indeed, impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon, for they are only authorized to bring in a verdict of guilty when satisfied and convinced beyond a reasonable doubt of the guilt of the accused."

The second case was *Griggs v. United States,* 158 F. 572, where the instruction was as follows (p. 577): "The defendant is presumed to be innocent until he is proved guilty by the evidence before you beyond a reasonable doubt. By reasonable doubt is not meant any doubt or conjecture which may occur to your mind, or may be imagined; *but it is a doubt which must arise from the evidence or lack of evidence, and*

for which some reason can be given". (Emphasis added.) Again the court disapproved the language emphasized, but did not regard it as constituting reversible error in the particular case. A dissenting opinion by the judge who wrote the opinion in the *Owens* case (p. 578) was committed to the view that the instruction constituted reversible error.

And the third case was *Louie Ding v. United States,* 246 F. 80, where the instruction was as follows (p. 83): *"Now a 'reasonable doubt' is just such a doubt for which you can give a reason.* When a juror is convinced to a moral certainty of the truth of the fact, then he is convinced beyond a reasonable doubt. It is not a doubt which is imaginary, conjectural, or speculative. Sometimes we say a reasonable doubt is such a doubt as a reasonable person in determining an issue of like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusions". (Emphasis added.) Once more, the court disapproved the language emphasized but did not regard it as constituting reversible error in the particular case.

In none of the three cases mentioned was the jury told, as it was told in this case (T. 8), that "A reasonable doubt is * * * not a probable doubt". The question in this particular case, therefore, is not only whether the language emphasized in the challenged instruction constitutes reversible error, but also whether that language constitutes reversible error in view of the setting in which it is found.

Five of the cited cases consider the question of "probable doubt". (*Rose v. United States,* 1945, 149 F. 2d 755, 759; *Henderson v. United States,* 143 F. 2d 681, 682; *Pon Wing Quong v. United States,* 1940, 111 F. 2d 751, 757; *Kearns v. United States,* 1928, 27 F. 2d 854, 855; *Arine v. United States,* 1926, 10 F. 2d 778, 780, 781.)

In *Rose v. United States,* 149 F. 2d 755, it was said, at page 759:

> "It should be remembered too, that: 'The proof in a criminal case need not exclude all doubt. If that were the rule, crime would be punished only by the criminal's own conscience, and organized society would be without defense against the conscienceless criminal and against the weak, the cowardly and the lazy who would seek to live on their wits. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt.' Henderson v. United States, 9 Cir. 1944, 143 F. 2d 681, 682."

In *Pon Wing Quong v. United States,* 111 F. 2d 751, it was said, at page 757:

> "Appellant thinks the following statement as found in one of the instructions constitutes error: 'You are to consider the strong probabilities of the case'. His argument is that 'The jury must of necessity construe such language to the effect that they were entitled under the law in determining the guilt or innocence of the appellant *to speculate* as to whether or no the appellant was guilty * * *.' (Italics supplied.)

Such argument fades out when the next line of the instruction is read: 'A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been explained to you.' "

In *Kearns v. United States,* 27 F. 2d 854, it was said, at page 855:

"Counsel earnestly insists that the instruction defining a reasonable doubt was condemned by this court in Arine v. United States, 10 F. 2d 778, but such is not the case. The only definition of reasonable doubt found in that case was, 'A persistent judgment to a very high degree of probability that the defendant is guilty as charged,' while here the instruction goes far beyond that. In fact, the instructions in the two cases have little in common, aside from the use of the expression, 'a persistent judgment to a very high degree of probability,' found in each. Here the court instructed the jury at length that there was a reasonable doubt, unless from the evidence the jury formed and had an abiding conviction to a moral certainty that the defendants were guilty, that an abiding conviction is a persistent judgment, and that you can confidently act upon it in the gravest affairs of life; that in any case proof can only be made to some degree of probability, but in a criminal case the proof of guilt must be that very high degree of probability that inspires a persistent judgment that the defendant is guilty as charged; that such high degree of probability must be based upon facts and circumstances in evidence, and not at all upon conjectures, speculation, or the doctrine of chances; that, if the

> jury had an abiding conviction, that is to say, a persistent judgment to a moral certainty, that the defendants were guilty as charged, they had no reasonable doubt and should convict accordingly; that the jury might have doubt of the guilt of the defendant, but it would nevertheless be their duty to convict unless their judgment approved such doubt as a reasonable one. It will thus be seen that the court defined a reasonable doubt in different ways, many of which, at least, have met with universal approval. The court treated the different definitions given as synonymous, and whether they were or not we need not inquire, because we are convinced that the jury was not and could not be mislead."

And in *Arine v. United States,* 10 F. 2d 778, it was said, at pages 780 and 781:

> "In defining reasonable doubt the court said: 'If you have a persistent judgment to a very high degree of probability that the defendant is guilty as charged, you have no reasonable doubt, and you are bound to convict him.' A number of courts have held that conviction beyond a reasonable doubt means more than a conclusion that there is a very high probability of guilt. * * * We think the court erred in his definition of reasonable doubt. For this and the other errors pointed out, the judgment is reversed, and the cause remanded for a new trial."

These quotations make it obvious that a "reasonable doubt" justifying an acquittal in a criminal action may be a "probable doubt". The language emphasized in the challenged instruction—language

which this court has consistently disapproved—therefore appears in a setting surcharged with error. Manifestly, the situation here is quite different from that disapproved but tolerated in the *Griggs* and *Louie Ding* cases.

It must be noted, moreover, that the *Griggs* case was decided in 1908 and the *Louie Ding* case in 1917. Later decisions of this court have been more solicitous in protecting the rights of defendants in criminal actions against erroneous instructions on the vital element of reasonable doubt. This is illustrated by the reversals of the judgments in *Arine v. United States,* 1926, 10 F. 2d 778, *De Groot v. United States,* 1935, 78 F. 2d 244, and *Paddock v. United States,* 1935, 79 F. 2d 872. Equal solicitousness on the same vital element would indicate that the passive disapproval in the *Griggs* and *Louie Ding* cases be converted into active disapproval and a conclusion of reversible error.

CONCLUSION.

Appellant again respectfully submits that the judgment appealed from should be reversed.

Dated, San Francisco, California,
September 30, 1946.

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